

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PERRY O. MACKALL

Plaintiff,

CIVIL ACTION NO. 05-CV-40115-FL

v.

DISTRICT JUDGE PAUL V. GADOLA

RICKY COLEMAN, et. al.,

MAGISTRATE JUDGE DONALD A. SCHEER

Defendants.

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: The Complaint should be dismissed pursuant to the three strikes provision of 28 U.S.C. § 1915(g), and Plaintiff's *in forma pauperis* status should be revoked.

* * *

Plaintiff, Perry Mackall, while a state prisoner incarcerated at the Deerfield Correctional Facility, in Ionia, Michigan¹, filed the instant prisoner civil rights suit, pursuant to 42 U.S.C. § 1983, on April 11, 2005, against two physicians and a nurse employed by the Michigan Department of Corrections (MDOC).

He alleged that the Defendants were deliberately indifferent to his serious medical needs. Plaintiff has been granted *in forma pauperis* status. See 28 U.S.C. § 1915(a)(1).

Under the Prison Litigation Reform Act ("PLRA"), the Court may dismiss a case if, on three or more previous occasions, a federal court has dismissed the

¹Petitioner was released from prison on September 29, 2005, and currently lives in Belleville, Michigan (See Notice of Change of Address at Docket #10).

incarcerated plaintiff's action because it was frivolous or malicious or failed to state a claim for which relief may be granted. See 28 U.S.C. § 1915(g) (1996). The Court's database reveals that Plaintiff has filed at least three (3) prior cases in the United States District Court for the Eastern District of Michigan which have been dismissed as frivolous or for failure to state a claim upon which relief may be granted. See:

<u>Case No.</u>	<u>Defendant(s)</u>	<u>Dismissal Date</u>	<u>U.S. District Judge</u>
05-CV-60077	Townsend	5/12/2005	John O'Meara
05-CV-71416	Davis	5/11/2005	Victoria Roberts
05-CV-71495	Fenby	5/09/2005	Lawrence Zatkoff

Plaintiff has also filed at least twelve (12) prior cases in the United States District Court for the Western District of Michigan, which have been dismissed in the past three months as frivolous or for failure to state a claim upon which relief may be granted.²

Plaintiff has made no showing that he is under imminent danger of serious physical injury, which would normally constitute an exception to the "three strikes" rule. Consequently, I am persuaded that the Court should revoke the Plaintiff's pauper status.

THREE STRIKES RULE

²Moreover, two cases filed in the United States District Court for the Eastern District of Michigan have been dismissed since August 2005 under the "three strikes" rule. See Mackall v. Cox, et. al., Case Number 05-71496 (J. Battani) and Mackall v. Doe, et. al., Case Number 05-71494 (J. Steeh).

A prison inmate who has accumulated at least three strikes is prohibited from proceeding *in forma pauperis* in subsequent civil actions or appeals unless the prisoner is under imminent danger of serious physical injury. The relevant statute provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this subsection if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

To fall within the statutory exception to the three strikes rule, a prisoner must allege that he is under imminent danger of serious physical injury at the time he files his complaint and seeks to proceed *in forma pauperis*. See Mitchell v. Tennessee, 86 Fed. Appx. 898, 899 (6th Cir. 2004). Plaintiff, however, has not shown that he is under imminent danger or that he risks serious physical injury. His complaint involves a disagreement with prison doctors about medications he received for back pain and an asthma condition.

Having carefully reviewed his complaint, I am persuaded that Plaintiff has not sufficiently alleged that he “is under imminent danger of serious physical injury” so as to fall within the exception to the “three strikes” provision of 28 U.S.C. § 1915(g). Accordingly, Plaintiff’s complaint should be dismissed under 28 U.S.C. § 1915(g). Furthermore, Plaintiff’s *in forma pauperis* status should be revoked, and he should not be allowed to proceed before this Court *in forma pauperis* pursuant to 28 U.S.C. § 1915(b). Should Plaintiff wish to pursue the allegations contained in this complaint, he should submit payment of the

\$225.00 filing fee, less the initial partial payment and any other amounts paid to the Court for this case, within 30 days. Upon receipt of the full filing fee, the Court could then re-open the case and review the complaint to determine whether it should be served upon Defendants or should be summarily dismissed under 28 U.S.C. § 1915A(b), which requires the Court to dismiss a complaint brought against governmental entities, officers, and employees if the complaint is “frivolous, malicious, or fails to state a claim upon which relief may be granted.”

The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge Gadola’s acceptance thereof is waived.

s/Donald A. Scheer
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: November 29, 2005

CERTIFICATE OF SERVICE

I hereby certify on November 29, 2005 that I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this paper was mailed to the following non-registered ECF participants on November 29, 2005. **Perry Mackall.**

s/Michael E. Lang
Deputy Clerk to
Magistrate Judge Donald A. Scheer
(313) 234-5217